

Claimant, a roofer, suffered an accidental injury on August 28, 1997 when he fell from a roof while working for respondent. Preliminary benefits were ordered paid by respondent and its insurance carrier following a hearing held on March 25, 1998. Respondent did not appear at that hearing but its purported insurance carrier was present by counsel. Claimant was the only witness to testify at that hearing. It was later determined that respondent did not have insurance coverage on the date of accident and, consequently, the Fund was given notice pursuant to K.S.A. 44-532a. A hearing was conducted pursuant to that application and after a determination was made that the employer could not be located and required to pay compensation, the Fund was found responsible for payment of the compensation previously ordered.

(1) For claimant to be eligible for workers compensation benefits, he must establish that the Act applies to his employment with respondent. The jurisdictional requirements of the Act include that respondent have a \$20,000 payroll.

“The Workers Compensation Act shall apply to all employments wherein employers employ employees within this state except that such Act shall not apply to: (2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees” K.S.A. 1997 Supp. 44-505(a).

Claimant testified that he was paid \$10 per hour and worked full time as part of a crew for respondent. At 40 hours per week this would exceed the \$20,000 threshold. Although the number of hours the crew could actually work was dictated somewhat by the weather and respondent’s ability to obtain roofing jobs, the fact that respondent employed several roofers that worked as a crew makes it more probable that the gross annual payroll for all employees exceeded \$20,000. The record also shows respondent had obtained workers compensation insurance coverage in the past. But this coverage had lapsed before claimant’s accident. Based upon this unrebutted testimony, the Appeals Board finds that claimant has met his burden to show that respondent had a sufficient payroll to meet the jurisdictional requirements of the Act.

(2) The Fund contends it was denied its right to a fair hearing because neither the employer nor claimant appeared at the hearing. The employer, Keith Davis, was found to have been given notice of the hearing but he was not subpoenaed or ordered to appear. K.S.A. 44-532a provides for the Fund to pay compensation where the employer cannot be located. Clearly, this statute contemplates circumstances where the employer may not be present at the hearing. The Fund’s argument that its right to a fair hearing was denied by the employer’s absence is without merit.

The claimant’s presence at the hearing is likewise not required if the claimant has otherwise established his entitlement to benefits under the Act. In this case, counsel for the claimant and counsel for the Fund agreed that the claimant’s testimony at the March 25, 1998 preliminary hearing could be considered for purposes of the July 14, 1998 preliminary hearing. Counsel for the Fund had not requested before the hearing that claimant appear nor did the Fund ask for the record to be left open to give the Fund additional time to obtain claimant’s testimony. In the absence of such a request, it is difficult to understand how the Fund can now claim prejudice. Moreover, there being no limit to the number of preliminary hearings, the Fund is free to request another hearing should there be evidence it wants to present. The Appeals Board finds that the Fund was not denied a fair hearing or due process of law.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order by then Assistant Director Brad E. Avery dated July 16, 1998 should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
Keith A. Davis, 1188 S 1750 RD E, Lawrence, KS
Jerry R. Shelor, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director